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76-1658

In the

Supreme Court of the United States

OCTOBER TERM, 1976

DYNAMIC MACHINE CO., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAWRENCE I. KIPPERMAN
MARK C. CURRAN
JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
Counsel for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

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The petitioner, Dynamic Machine Co., respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 31, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at 1a. The Decision and Order of the National Labor Relations Board, issued on December 15, 1975, is reported at 221 NLRB 1140 (1975), and appears in the Appendix hereto at 21a.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued and entered on March 31, 1977. This Court's jurisdiction is invoked under 28 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the court below err in interpreting *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), as imposing a bargaining obligation on a successor employer when there had been no collective bargaining between the union and the predecessor employer, no collective bargaining agreement had been entered into covering any of the successor's employees, and there has never been any evidence that the union seeking to represent the successor's employees has ever enjoyed the support of the majority of those employees?

2. Should the continuing validity of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), be examined if, as the court below held, the majority opinion in *Burns* requires the imposition of a bargaining obligation on a successor employer when there exists no evidence that the union represents a majority of the successor's employees?

STATUTES INVOLVED

National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §151 *et seq.*:

> "§7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." (29 U.S.C. §157).
>
> "§8.(a) It shall be an unfair labor practice for an employer—
>
> • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." (29 U.S.C. §158(a)).
>
> "§9.(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." (29 U.S.C. §159(a), (b)).

STATEMENT OF THE CASE

The Election at Dynamic I

On March 20, 1974, a secret ballot election was held by the National Labor Relations Board (NLRB) among the employees of Dynamic Machine Co. ("Dynamic I")* to determine whether the employees wished to be represented by District No. 8 of the International Association of Machinists & Aerospace Workers (the "union"). It

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* The purchase of the assets of Dynamic I by a totally-unrelated corporation ("Dynamic II"), petitioner herein, is described in detail *infra*, at 4-5.

was an extremely close election under any view: 19 votes were cast for and 16 votes against union representation, with 6 union challenges remaining. An NLRB Hearing Officer found on September 3, 1974, that three of the chalienged voters were not supervisors within the meaning of §2(11) of the NLRA (29 U.S.C. §152(11)) and, consequently, recommended that their ballots be opened and counted.

Thus, based on the Hearing Officer's Report, it appeared that the union would not be certified as the bargaining representative of Dynamic I's employees, since the overruling of the union challenges would naturally be expected to lead to three additional votes against representation and a 19-19 tally, with the resulting defeat for union representation.* The union filed exceptions to the Hearing Officer's Report with the NLRB.

The Sale to Dynamic II

While these exceptions were pending before the NLRB, Dynamic Machine I's assets were sold to NJM Corporation on December 9, 1974. The purchase agreement provided for the purchase of most of Dynamic I's assets, including its corporate name, but also provided that NJM "shall assume none of the liabilities or obligations of" Dynamic I. The actual sale took place on January 6, 1975, and NJM began operating on that date as Dynamic Machine Co. ("Dynamic II," petitioner herein), with the then-current employees of Dynamic I.

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* A tie vote results in the defeat of a union's representation efforts because, under §9(a) of the NLRA (29 U.S.C. §159(a)), a union must be selected by "the *majority* of the employees in a unit appropriate for such purposes."

Dynamic II is, and always has been, a completely separate and distinct corporate entity from Dynamic I. Dynamic II's stockholders, directors, and officers had no prior employment, familial, or financial relationship with Dynamic I or any of its stockholders, officers, or directors.

Employee Turnover

From the date of the representation election on March 24, 1974, to the date of the purchase by Dynamic II on January 6, 1975, there was a substantial turnover in the company's workforce. This turnover occurred prior to the NLRB certification of the union as bargaining representative and before the union engaged in any collective bargaining or other activities on the employees' behalf. Seventeen employees left the company. Dynamic I hired 12 new employees. Thus, when Dynamic II began operations, only 20 of its 32 employees had had the opportunity to vote in the representation election. And from January 6, 1975, until February 7, 1975, when Dynamic II refused to bargain with the union, one more employee left the company, one was promoted to a supervisory position, and three new employees were hired. Thus, as of February 7, 1975, only 18 of Dynamic II's 33 employees had voted in the election held nearly a year earlier. Significantly, 19 of the 37 employees, over one-half, who had voted in the election were no longer employed by Dynamic II when the union's bargaining request was refused.

The NLRB Decision and Dynamic II's Response to the Union's Bargaining Request

Nine days after Dynamic II began operations, the NLRB ruled on the exceptions filed to the Report of the Hearing Officer and issued its Decision and Certification

of Representative. The NLRB reversed the Hearing Officer's determination that Harry Tietz was not a supervisor and sustained the union's challenge to his ballot.* The 19 votes for representation thus gave the union a bare one-vote majority, and the union was certified as the exclusive bargaining representative of Dynamic I's employees.

In response to the union's subsequent request to commence bargaining, Dynamic II declined, explaining that its good faith doubt of majority support for the union was based on the sale of the assets of Dynamic I to an unrelated, separately incorporated entity and the substantial employee turnover. Dynamic II did, however, state its willingness to cooperate fully in conducting a new election among its employees to ascertain their sentiments concerning union representation. In a letter to the union, Dynamic II explained:

> "We want to assure you that this refusal [to commence negotiations and submit information] is in good faith and that we shall cooperate with the Union to get an expeditious determination of our position with regard to the ground upon which our refusal is based. Hopefully, we can stipulate to all of the facts necessary to make such a determination.
>
> "Alternatively, Dynamic Machine Co. is willing to resolve its present differences with the Union in an even more expeditious manner. To that end, we suggest that the Union and Dynamic immediately enter into an agreement to have a secret ballot election conducted to determine whether the Union represents

* This ruling made the union's two remaining challenges non-determinative, and the Hearing Officer's rulings that those two employees were not supervisors were left undisturbed.

> a majority of our employees in an appropriate unit. The election could be conducted by the National Labor Relations Board or another neutral party, perhaps the American Arbitration Association.
>
> "If a majority of employees select the Union, we would promptly commence negotiations. We would appreciate your advising us as soon as possible if you are interested in this approach and we can then immediately get together to discuss the details of the election."

The union refused Dynamic II's offer to hold an election. Indeed, to this day the union has never come forward with any evidence—such as signed authorization cards—to support its claim to represent a majority of Dynamic II's employees.

The Unfair Labor Practice Charge and Court of Appeals Decision

On February 13, 1975, the union filed an unfair labor practice charge based on Dynamic II's refusal to bargain. In order to expedite proceedings, the case was submitted directly to the NLRB on a stipulated record.

The NLRB issued its Decision and Order on December 15, 1975. (221 NLRB 1140; 21a, *infra*). The Board rejected Dynamic II's position that the substantial employee turnover since the representation election coupled with the purchase of the company by a good faith purchaser at a time when no union was certified as a representative of the seller's employees prevented, under a balancing of all the interests involved, the issuance of a bargaining order without some demonstration by the union that it did in fact represent a majority of Dynamic II's employees. The Board mechanically applied the certification year doctrine, approved by the Court in a single-employer context

in *Brooks* v. *NLRB*, 348 U.S. 96 (1954). Ignoring the absence of any evidence of majority support for the union among Dynamic II's employees and the unique features of the successorship case, the Board applied the "irrebutable presumption that the majority status of a certified union continues for 1 year from the date of the certification." (27a, *infra*).

Dynamic II petitioned for review of this NLRB Decision by the United States Court of Appeals for the Seventh Circuit, pursuant to 29 U.S.C. §160(f), and the NLRB cross-petitioned for enforcement.

The Court of Appeals acknowledged, but cast aside as "dictum" (9a, 13a, *infra*), the subsequent direction of this Court in *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249, 262-63 n.9 (1974), that the obligations of a successor employer can be determined only on the basis of a case-by-case analysis of the facts in light of the applicable statutory obligation. Instead of viewing all of the facts to determine whether the union had the support of the majority of Dynamic II's employees, as required by §9(a) of the NLRA (29 U.S.C. §159(a)), the court below interpreted *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), as requiring the automatic application of the *Brooks* certification year doctrine. (16a, *infra*).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT DEFINING THE BARGAINING OBLIGATION OF A SUCCESSOR EMPLOYER.

In this case the decision of the court below, ordering Dynamic II to bargain with a union that has come forward with absolutely no evidence that it represents a majority of Dynamic II's employees, clearly conflicts with two recent decisions of this Court—*NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249 (1974)—significantly impairs the rights under §7 of the NLRA of these employees to a free choice in selecting a bargaining representative, and ignores the statutory mandate "to assure to employees the fullest freedom in exercising the rights guaranteed" by the NLRA.

The NLRA (29 U.S.C. §151 *et seq.*) establishes the rights of all employees

> "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (§7; 29 U.S.C. §157).

Of equal stature, however, is the correlative "right to refrain from any or all of such activities." (*Id.*). The fundamental purpose is "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." (§9(b); 29 U.S.C. §159(b)).

Only if a labor union has been "designated or selected for the purposes of collective bargaining by the *majority* of the employees" in an appropriate bargaining unit does the law require than an employer engage in collective bargaining with that union. (§§9(a), 8(a)(5); 29 U.S.C. §§159(a), 158(a)(5)).

When Dynamic II declined to bargain with the union, suggesting that a new election be held instead, 15 of its 33 employees had never had a chance to vote on whether they desired union representation. They had been hired after the election at Dynamic I but prior to the NLRB certification, during a time when it appeared very unlikely that such a certification would be forthcoming. Of the remaining 18, who did vote in the one-vote election conducted nearly one year prior to the asset sale, it can be assumed that only approximately one-half supported the union. Even that assumption is, of course, an uncertain one; the union never acted on behalf of these employees. No negotiations were ever held; no collective bargaining agreement was ever signed; the terms and conditions of employment of these employees were never affected by the union's presence. The changed circumstances resulting from the change in ownership, supervisors, labor relations personnel, and labor relations policies, may well lead even those who voted for representation to question their need for it now.

This Court has recognized that a determination of the bargaining obligation of a successor employer requires a delicate case-by-case balancing of the legitimate interests of all parties in light of the specific facts presented. Only such a particularized approach, mindful of the peculiar facts presented in each case, can assure to the fullest the rights of the employees to organize, or,

equally importantly, to refrain from organizing, protected by §7 of the NLRA, and the legitimate interests of the successor employer.

As the Court explained in *Howard Johnson Co., Inc., supra*, 417 U.S. at 262-263 n.9:

> "The answer to this inquiry [into the legal obligations of the new employer] requires analysis of the interests of the new employer and the employees and of the policies of the labor laws *in light of the facts of each case* and the particular legal obligation which is at issue. . . ." (Emphasis added).

The Court further noted that:

> "Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, *emphasis on the facts of each case as it arises is especially appropriate.*" (417 U.S. at 256; emphasis added).

Such an approach had been applied earlier by the Court to the question of the bargaining obligations of a successor employer in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). As the Court recognized, under §9(a) of the NLRA (29 U.S.C. §159(a)), Burns could be required to bargain with the union seeking recognition only if the union was "the representative of a majority of the employees in an appropriate unit." The Court noted that its resolution of necessity, therefore, "turns to a great extent on the precise facts involved here." (406 U.S. at 274).[1]

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[1] This Court reaffirmed this reservation in its discussion of *Burns* in *Howard Johnson Co., Inc., supra*, 417 U.S. at 256.

Rather than conducting the factual analysis necessary to determine whether the union in fact represented a majority of Dynamic II's employees, the analysis mandated by *Howard Johnson Co., Inc.* and *Burns*, the court below interpreted *Burns* as authorizing the mechanistic application of the Board's certification year doctrine to the exclusion of all the evidence demonstrating the absence of majority support for the union. Such an interpretation of *Burns* is completely contrary to the Court's instructions in *Howard Johnson Co., Inc.* and *Burns* itself that *all* of the particular facts must be carefully examined and balanced in light of the policies expressed in §§7 and 9(a) of the Act in determining a successor's bargaining obligation. In addition, the policies and presumptions underlying the certification year doctrine in a single-employer situation are inapplicable and inappropriate when the issue is a successor employer's bargaining obligation.

In *Burns* the Court carefully examined the fact that Burns had succeeded to a security services contract previously performed by Wackenhut Corporation only four months after Wackenhut's employees had voted for union representation, only three months after a union was certified as a bargaining representative for these employees, and only two months after Wackenhut and the union had negotiated a collective bargaining agreement. Finally, Burns hired 27 of the Wackenhut employees who had voted in the election and enjoyed the fruits of union representation and added only 15 of its own employees from other locations. (406 U.S. at 274-275).

In *Burns* the Court, rather than mechanistically applying the certification year doctrine, as did the court below, considered the specific facts presented:

> "In an election held but a few months before, the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in an identical unit. It is undisputed that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective-bargaining contract. In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact." (406 U.S. at 278).

Thus, the Court in *Burns* carefully examined the specific facts to determine whether the union represented a majority of Burns' employees. The evidence of continued majority support for the union was substantial. The 27 former Wackenhut employees had all voted in the very recent election that resulted in the union being certified as their bargaining representative. A collective bargaining agreement had been negotiated on their behalf. There was, the Court concluded, a reasonable basis for the Board to find that these employees continued to desire representation and that, even with the addition of 15 employees from other Burns' locations, the union enjoyed majority support.[2]

---

[2] The four dissenters, however, seriously disputed this conclusion:

> "[I]t is by no means mathematically demonstrable that the union was the choice of the majority of the 42 employees with which Burns began the performance of its contract with Lockheed. True, 27 of the 42 had been represented by the union when they were employees of Wackenhut, but there is nothing in the record before us to indicate that all 27 of those employees chose the union as their bargaining agent

The Court did note parenthetically that, in a single-employer context, under the decision in *Brooks* v. *NLRB*, 348 U.S. 96 (1954), a Board certification carries with it an almost conclusive presumption that the majority representative status continues for a reasonable time, usually a year. (406 U.S. at 279 n.3). It was this reference that the court below seized upon in applying in a mechanical fashion *Brooks'* certification year doctrine in the wholly different successorship context.

If the Court in *Burns* had intended the *Brooks'* certification year doctrine to control mechanistically the outcome it would have written a far different opinion. The review of all of the facts supporting the conclusion that the union continued to represent a majority of the employees would not have been necessary. Under *Brooks*, expressions of employee support for the union or the lack thereof are deemed irrelevant to the application of the certification year doctrine. Discussion of Burns' knowledge of the support for union representation by the Wackenhut employees would also have been irrelevant if the Court intended a rigid application of *Brooks*. Nor would the Court's reference to its *Brooks* decision have been buried in a footnote.

The Court was well aware that some lower courts have applied *Brooks* in a successor context. (406 U.S. at 279). But it implicitly rejected this approach by examining and balancing all of the factors present in the case to

[2] (Continued)

even at the time of negotiations with Wackenhut. There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by Wackenhut, had ever expressed their views one way or the other about the union as a bargaining representative." (406 U.S. at 297).

determine whether there was continued majority support for the union among Burns' employees.

A recent election and the recent negotiation of a collective bargaining agreement may be conclusive when a majority of the successor's employees have come from the predecessor's operations having voted in the election and enjoyed the fruits of representation. But, where other facts demonstrate that the election is not probative of union majority support among the successor's employees, the election cannot, consistent with the mandate of §9(a) of the NLRA, be given such conclusive effect.[3]

Moreover, the principles behind the approval of the certification year doctrine in *Brooks* simply do not apply in a successorship context. As explained in *Brooks*, the doctrine was intended primarily to promote industrial stability, to deny to employers the opportunity to erode a union's strength through dilatory tactics, and to avoid the administrative expense of conducting frequent elections. (348 U.S. at 99-100). In a single-employer context, these policies were deemed significant enough to over-

[3] As the D.C. Circuit has explained,

"For a duty to bargain with the Union to survive the takeover there should be some significant indication that a majority of the employees concerned desired that the Union bargain for them collectively.

"In many situations the fact that a union has represented a group of employees in the past serves as a basis for a presumption of continuing employee adherence to it. But if the circumstances of a particular case destroy the logical basis without which the presumption cannot stand, the historic relation loses evidentiary significance." (*International Association of Machinists* v. *NLRB*, 498 F.2d 680, 682 (D.C. Cir. 1974); footnote omitted).

ride even a clear showing by a majority of employees that they no longer desired union representation.

Of necessity, however, the pursuit of industrial stability, the major policy behind the *Brooks'* presumption, is inherently unobtainable in the successor context:

> "Successorship itself disrupts union-employer relationships, and there is less reason to fear that a change in union representation will have baneful effects on an established practice of labor relations. Moreover, employees' choice of a union representative may often be strongly influenced by their perception of the employer, and a change in owners may alter employees' sentiments with respect to various labor organizations. Therefore, after a change of employers the factual basis of a presumption of continued majority support for a previously selected union is diminished." (Comment, "The Bargaining Obligations of Successor Employers", 88 Harv. L. Rev. 759, 763 (1975)).

Moreover,

> "[O]ne of the central policies served by the certification bar—preservation of a stable bargaining relationship between employer and union representative—is inapplicable, since when there is a new employer no established relationship can exist." (*Id.*, at 764).[4]

[4] The denial of a bargaining order in the instant case would not impinge upon the two other underlying concerns expressed in *Brooks*. Thus, Dynamic II was not delaying to gain time to erode the union's strength; it proposed an expedited election. The hiatus which occurred between the election and the sale resulted from NLRB procedures and not from any scheme of the predecessor employer to evade its bargaining obligations by liquidating its business. Further, Dynamic II suggested the expedited election be conducted by the NLRB or the American Arbitration Association, thus suggesting a procedure which would eliminate the administrative expense.

Because the reasons that permit the *Brooks'* presumption in a single-employer case do not permit its application in a successorship context, the utter disregard of the §7 rights of Dynamic II's employees evidenced by the Court of Appeals' mechanistic application of that presumption herein cannot be permitted.[5]

> "Protection of employees' remedial rights in refusal to bargain cases where the union is seeking initial recognition should be balanced by some assurance that the union which is the beneficiary of such a remedial order enjoys a majority status in the successor's unit. Employees subjected to an unwanted bargaining agent may not retain faith in the Board procedures and in the future, refrain from seeking Board protection. Protection of employee choice requires that this assurance be provided not by presumptions, but by some evidence of majority support at the time the successor commences opera-

[4] (Continued)
The union, however, chose to proceed through the NLRB's unfair labor practice procedures, with their attendant administrative expense. As the Seventh Circuit has remarked in quoting an NLRB Trial Examiner in an analogous circumstance, the union preferred to let the NLRB "handle its hot chestnuts with tongs of technicalities instead of going to an election." *NLRB* v. *Laystrom Mfg. Co.*, 359 F.2d 799, 801 (7th Cir. 1966).

[5] The Court of Appeals based its rigid application of the certification year doctrine on the desire for "uniformity and predictability of decision-making." (16a, *infra*). Precisely such goals were eschewed by the Court in *Howard Johnson Co., Inc.*, where the Court noted that "emphasis on the facts in each case as it arises is particularly appropriate." (417 U.S. at 256). Moreover, the goal of uniformity must give way to the more important policy, mandated by §9(b) of the NLRA (29 U.S.C. §159(b)), of assuring "employees the *fullest freedom* in exercising the rights guaranteed by this Act."

tions." (W. DuRoss, "Protecting Employees Remedial Rights Under the Perma Vinyl Doctrine", 39 Geo. Wash. L. Rev. 1063, ... (1971)).

It is now over three years since the election, held among the employees of Dynamic I, was won by the union by a single vote. By the time the Board's certification issued and the union demanded bargaining by the successor employer, nearly one-half of the employees who had voted in the election had left and were replaced by employees who have never had the opportunity to express the freedom of choice guaranteed them by law. As a result, nearly three-fourths of Dynamic II's employees, as of February, 1975, either actively opposed representation or had not been allowed to express their desires.[6] Any turnover that has occurred since that date has further weakened the union's empty claims to represent a majority of the employees. To saddle these employees now with an unwanted bargaining representative for at least one year is impermissible.[7]

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[6] In sharp contrast, 27 of Burns' 42 employees had voted in the recent election and had enjoyed the fruits of collective bargaining by the union on their behalf.

[7] The NLRB, in even less egregious circumstances, has recognized that an election among a predecessor's employees may be a very poor indicator of the sentiments of the successor's employees even where the successor employed a vast majority of employees who had voted in the election. *See Thomas Engine Corp.*, 179 NLRB 1029 (1970), *enf'd*, 442 F.2d 1180 (9th Cir. 1971), where the Board refused to certify the results of an election conducted among the predecessor's employees even though 90 of the successor's 97 employees had voted in the election. As the Board explained in a Memorandum filed with the district court in *UAW* v. *NLRB*, 317 F. Supp. 1162 (D.D.C. 1970), *aff'd per curiam*, 462 F.2d 298 (D.C. Cir. 1972):

> "In this special factual context, the Board could reasonably conclude that the basic rights which the Act seeks to protect—specifically, the privilege to freely organize for the purpose of collective bargaining—would be best effectuated by a new test of employee desires. . . . Indeed, as the Board noted, to certify mechanically the results of the prior election would give pivotal weight to the votes of a near majority (46%) who were no longer part of the electorate, while at the same time effectively disenfranchising the new Upshur employees and totally disregarding any possible alteration in the attitude of the group carried over from Thomas. The direction of a new election, on the other hand, would avoid these inequities, while in no way prejudicing the representation rights of the current employees—they would vote for or against unionization without further delay . . . and would do so free from the artificial influence of the now non-existent Thomas electorate."

Similar sensitivity was demonstrated by the Ninth Circuit in ordering a new election in *NLRB* v. *Inland Machinery Co.*, 80 LRRM 2738 (9th Cir. 1972), *denying enforcement in part of Webb Tractor & Equipment Co.*, 181 NLRB 230 (1970).

These decisions were ignored by the Board in this case, and, although they were cited to and extensively discussed before the Court of Appeals herein, the Court's decision makes no reference to them whatsoever.

Blind adherence to the certification year doctrine is totally at odds with this Court's mandate to balance the interests in light of all of the facts in successorship cases. If the guarantees of §§7 and 9 of the NLRA are to have any meaning, the unthinking mechanistic decision of the court below, so contrary to the sensitivity and concern for the rights of all parties in a successorship case ex-

pressed by this Court in *Burns* and *Howard Johnson Co., Inc.*, must be reversed.

II. IF THE MAJORITY OPINION IN NLRB v. BURNS INTERNATIONAL SECURITY SERVICES, INC. REQUIRES THE AFFIRMANCE OF THE DECISION OF THE COURT BELOW, THIS COURT SHOULD EXAMINE BURNS' CONTINUING VALIDITY.

If this Court should decide that the majority opinion in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), compels the application of the certification year doctrine in the successorship context where there is no evidence that the union represents a majority of the successor's employees, this case presents the appropriate vehicle for reexamining *Burns'* continuing validity.

As the four dissenters in *Burns* correctly explained, the majority's conclusion that the union represented a majority of Burns' employees lacked any factual basis:

> "[I]t is by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract with Lockheed. True, 27 of the 42 had been represented by the union when they were employees of Wackenhut, but there is nothing in the record before us to indicate that all 27 of these employees chose the union as their bargaining agent even at the time of negotiations with Wackenhut. There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by Wackenhut, had ever expressed their views one way or the other about the union as a bargaining representative." (406 U.S. at 297).

The dissenters concluded:

> "[T]here was no evidence at the time as to the preference of a majority of the employees at the Lockheed facility as to a bargaining agent . . . ." (406 U.S. at 299).

As demonstrated in part I, *supra*, the facts in the instant case reflect an egregious violation of the principles of the NLRA. Only 18 of Dynamic II's 33 employees voted in the representation election, which had been decided by only a single vote. It must be assumed as a result that only a bare majority of these 18 employees have at any time manifested their support for representation. The remaining 15 Dynamic II employees have never had the chance to express their preference in this regard. They may desire representation; they may not. But the Board and Court of Appeals decisions herein would deny them the right to choose and would force a bargaining representative upon them, even though Dynamic II has stood ready from the outset to cooperate fully in the conduct of a new election at which time the desires of the majority could be ascertained.

Section 9(b) of the NLRA (29 U.S.C. §159(b)) establishes the obligation of the NLRB and the courts "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." The right of employees to "refrain from" collective actions is specifically provided in §7 of the Act. (29 U.S.C. §157). The decisions in this case make a mockery of these statutory protections.[8]

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[8] Only the union as an institution can benefit from the imposition of an unwanted bargaining representative on Dynamic II's employees. But, as has often been recognized:

Petitioner submits that, if this Court interprets *Burns* as requiring affirmance of the decision of the Court of Appeals, the continuing validity of *Burns* should be reexamined. The principles underlying §§7 and 9 of the NLRA require that, before a successor employer may be compelled to bargain with a union claiming to represent a majority of its employees, the union makes some affirmative showing of majority support as contemplated by §9(a) of the Act. *See International Association of Machinists* v. *NLRB,* 498 F.2d 680, 682 (D.C. Cir. 1974); W. DuRoss, "Protecting Employee Remedial Rights Under the Perma Vinyl Doctrine", 39 Geo. Wash. L. Rev. 1063, ... (1971); *cf. NLRB* v. *Downtown Bakery Corp.,* 330 F.2d 921, 927 (6th Cir. 1964).

As the union in this case has made no such affirmative showing whatsoever, the decisions of the Court of Appeals and the NLRB ordering Dynamic II to bargain with the union must be set aside.

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* (Continued)

"[What] the statute was enacted to accomplish was to protect not the rights of unions to obtain representation contracts but the rights of employees to be represented by a bargaining agent of their own choosing, and that, under all circumstances, these rights must be protected and preserved." (*NLRB* v. *Red Arrow Freight Lines, Inc.,* 193 F.2d 979, 981 (5th Cir. 1952)).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LAWRENCE I. KIPPERMAN
MARK C. CURRAN
JAMES S. WHITEHEAD
Counsel for Petitioner

Of Counsel:
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

APPENDIX

Opinion and Judgment of United States Court of Appeals for the Seventh Circuit

No. 76-1036

DYNAMIC MACHINE CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ARGUED SEPTEMBER 24, 1976 — DECIDED MARCH 31, 1977

Before SPRECHER, BAUER, *Circuit Judges*, and KUNZIG, *Judge*.*

BAUER, *Circuit Judge*. The petitioner asks us to overturn a National Labor Relations Board order directing it to bargain with District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO. The Board cross-petitions for enforcement of its order. Before us for review are the Board's findings (1) that Dynamic Machine Co., a successor employer[1] to a firm

* The Hon. Robert L. Kunzig, Judge of the United States Court of Claims, is sitting by designation.

[1] When used in this opinion, the term "successor employer" has no significance other than that of referring to an employer who has succeeded to the operation of an existing business.

that participated in a representation election won by the union, is obligated to bargain with the union; and (2) that Foreman Harry Tietz was a supervisor within the meaning of Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(11). We enforce the Board's order.

I.

On March 20, 1974, a representation election was held among the employees of the petitioner's predecessor, which bore the same name (hereinafter "Dynamic I"). Nineteen votes were cast in favor of union representation; 14 votes against. The union challenged 8 ballots, 6 on the ground that the votes were supervisors, 2 on other grounds. Dynamic I filed an objection to the election based on a union campaign letter distributed to the employees within a week of the election.

The Board conducted a hearing on the challenged ballots and the objection in June 1974. At the hearing, the parties stipulated to the counting of the two ballots that were challenged on grounds other than that the voter was a supervisor. Both ballots were found to have been cast against the union. The tally then stood at 19 votes for representation, 16 against representation, with 6 challenges outstanding.

On September 3, 1974, the hearing officer issued a report denying Dynamic I's objection. He also denied the union's challenges to three of the ballots allegedly cast by supervisors and upheld its challenges to the other three ballots. Both Dynamic I and the union filed exceptions to the hearing officer's report with the Board.

On December 9, 1975, while these exceptions were pending before the Board, NJM Corporation agreed to purchase substantially all of Dynamic I's assets, including its name and goodwill. The agreement provided, with certain exceptions not relevant here, that NJM would not assume Dynamic I's liabilities or obligations.

On January 6, 1975, the sale took place, and NJM began operating as Dynamic Machine Co. ("Dynamic II").[2]

The two companies are separate and distinct commercial entities. The stockholders, directors and officers of Dynamic II held no positions with Dynamic I and had no familial or financial relationships with persons connected with Dynamic I. None of the three individuals with authority to formulate Dynamic II's labor and employment policies held or exercised such authority on behalf of Dynamic I.

At the time of the sale, Dynamic II was aware of the representation proceeding pending before the Board. After the sale, Dynamic II continued Dynamic I's business without interruption—operating the same plant, using identical methods and essentially the same equipment to manufacture the same type of products on the same job order basis for primarily the same customers. No job classifications were changed, nor were new foremen brought in from outside the plant. Dynamic II retained all thirty Dynamic I employees in the bargaining unit.

Between the date of the representation election and the date of purchase, 17 unit employees left Dynamic I, and 12 new employees were hired. Between the date of purchase and February 7, 1975, when Dynamic II refused to recognize the union, one employee who had voted in the election left the company, another was promoted to a supervisory position, and three new employees were hired.

On January 15, 1975, after the sale, the Board issued its decision certifying the union as the exclusive bargaining representative of Dynamic I's employees. The Board adopted the findings of the hearing officer respecting Dynamic I's objection. It also approved the three ballot

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[2] After the sale, Dynamic I became defunct and began dissolution.

challenges upheld by the hearing officer, but reversed his denial of the union's challenge to Harry Tietz's ballot. Because the two remaining union ballot challenges could not affect the outcome of the election (inasmuch as the final outcome would be 19-18 in favor of the union even if both challenges were denied and the ballots were found to be cast against the union), the Board certified the union without inquiring into their validity.

On February 7, 1975, the union requested a bargaining meeting and certain information from Dynamic II. Dynamic II replied that it was not required to commence negotiations or to submit the information, both because it was a separately incorporated entity unrelated to Dynamic I and because a substantial turnover of unit employees since the representation election called the union's majority status into question. On February 13, 1975, the union filed an unfair labor practice charge against Dynamic II with the Board, alleging that the company had refused to bargain with the certified bargaining representative of its employees.[3]

On December 15, 1975, acting on a stipulation of facts after a waiver of intermediate proceedings before an administrative law judge, the Board issued the decision and bargaining order against Dynamic II that is before this Court.

II.

In its order, the Board found that Dynamic II was obligated to bargain with the union as a successor employer to Dynamic I because of the similarity of operation of the two firms and Dynamic II's retention of

[3] Two months later, Dynamic II suggested to the union that a new election be held to determine whether the union still represented a majority of the unit employees. The union declined to accept the suggestion.

all the unit employees.[4] Relying on cases establishing that the certification bar rule[5] is unaffected by normal turnover of unit employees,[6] the Board rejected Dynamic II's argument that post-election employee turnover possibly affecting the union's majority status among the unit employees should be taken into account in determining its bargaining duty as a successor employer. The Board also rejected, on the basis of *N.L.R.B.* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), Dynamic II's argument that it need not bargain with the union certified to represent Dynamic I's employees because it purchased Dynamic I in good faith without assuming its obligations.

[4] The board also refused Dynamic II's request to reconsider the validity of the union certification because the issue had been fully litigated in the Dynamic I representation proceeding.

We, of course, are not prevented from reviewing at this time the issues litigated in the underlying representation proceeding. 29 U.S.C. § 159(d).

[5] The certification bar is an almost irrebuttable presumption that a union continues to hold the support of a majority of the employees in the bargaining unit for a reasonable time, usually one year, following its certification as exclusive bargaining representative. *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); *Celanese Corp. of America*, 95 NLRB 664 (1951). The bar is designed to allow the union both to carry out its mandate without being put "under exigent pressure to produce hothouse results or be turned out," and to minimize an employer's temptation to undermine the union's strength rather than to negotiate and administer a collective bargaining agreement in good faith. *Brooks* v. *N.L.R.B.*, *supra* at 100.

[6] E.g., *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1484 (1965), *enforcement denied on other grounds*, 359 F.2d 799 (7th Cir. 1966).

III.

Dynamic II first argues that the union certification was improper because the Board erroneously found that Harry Tietz was a supervisor ineligible to vote in the representation election.

The relevant facts found by the hearing officer and not disputed by the parties are as follows:

At the time of the election, Harry Tietz was the "working foreman"[1] of Dynamic I's grinding department located in a building across the street from the main plant. He and six other employees operated 23 grinding machines of four different types. Most employees usually worked on only one type of machine, although Tietz and at least one other employee commonly operated several types. Apart from operating the machines, Tietz's major duty was to assign the work sent to the department from the main plant. As the most experienced employee, he usually took most of the difficult and rush jobs himself, and assigned the more routine work and the difficult or rush work he could not perform to the other employees. In assigning the work, he took into account each employee's relative abilities, workloads and familiarity with the appropriate machine for the job. After assignment, the employee ran the job without Tietz's supervision.

Tietz's duties as foreman also included relaying employment requests for time off and wage increases to management, distributing paychecks, correcting time cards of employees who forgot to punch in, occasional consulting with management regarding the other employees' job performance, and attending management meetings where productivity and similar issues were discussed. He had no authority to hire, fire or promote his coworkers.

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[1] Tietz so characterized his job at the representation hearing.

Apart from the above, Tietz was distinguished from the other department employees in that he received a higher wage and bonus, was paid on a salary rather than hourly basis, and was given keys to the plant. However, he worked the same hours, wore the same clothes, and used the same locker facilities as the others.

Section 2(11) of the Act, 29 U.S.C. § 152(11), provides that:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Applying this standard to the undisputed facts noted above, the hearing officer concluded that Tietz was not a supervisor because he exercised no independent judgment in assigning work, the principal supervisory-type task listed in the statute that he performed. The Board overruled the hearing officer. It found that Tietz "independently assigns and directs work" and that he provides "whatever day-to-day supervision the six employees receive" because he is "the only responsible working foreman in a physically isolated part of the employer's plant."

The parties agree that only one of the supervisory powers listed in Section 2(11) need be present for the Board to find Tietz a supervisor. *N.L.R.B.* v. *Brown Specialty Co.*, 436 F.2d 372, 375 (7th Cir. 1971); *N.L.R.B.* v. *Elliott-Williams Co.*, 345 F.2d 460, 463 (7th Cir. 1965). They concentrate their arguments on whether Tietz uses independent judgment in assigning work.

The employer argues both that the Board failed to enter a finding that Tietz exercised supervisory authority in assigning work, and that, even if such a finding

was made, it is not supported by the record, which shows that Tietz's assignments wer of a routine nature.

The Board replies to the first point that it entered the necessary finding in its statement that Tietz "independently assigns work" to the other departmental employees. The employer rejoins that this statement was not a sufficient basis for the Board's conclusion because it was not an explicit finding that Tietz exercised "independent judgment," as required by the statute.

We find no merit in this argument. Although the Board did not track the exact language of the statute in drafting its finding, in view of its overruling of the hearing officer and its conclusion that Tietz was a supervisor, the language it used clearly was meant to convey the concept of independent judgment.

Turning to Dynamic II's second point, the absence of support in the record for the Board's finding, we recognize that the question of whether Tietz's assignment of work involved the exercise of independent judgment is a close one. The Board believes that Tietz's assignment duties necessarily involved the exercise of independent judgment because he was required to match the nature of the job with the relative skills and availability of the different employees. Dynamic II argues that Tietz's assignments were made strictly in accordance with workshop routine. Work was assigned automatically to the employee who operated the particular machine on which the job must be run. If more than one employee could run the machine required, the job went to the first employee who needed work. If it was a priority job, or one that called for close tolerances, it went to Tietz or another trusted senior employee.

We agree with Dynamic II that the choices Tietz had in assigning work were severely circumscribed by objective factors outside his control, such as the requirements of the job and the limited skills of most of his coworkers. However, although Tietz's options were limited and only

a few factors needed to be taken into account in assigning work, his assignments required the exercise of his own judgment as to the nature of the job, the level of skill needed to complete it, and the relative abilities of particular employees to do it. Whether or not such an exercise of judgment, limited as it is, is sufficient to render Tietz a supervisor is a question which we think calls into play the

> "Board's special function of applying the general provisions of the Act to the complexities of industrial life." *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

As we have said before, in reviewing cases involving the question of whether employees are supervisors within the meaning of the Act, we permit the Board "a large measure of informed discretion." *N.L.R.B.* v. *Process Corp.*, 412 F.2d 215, 218 (7th Cir. 1969); *N.L.R.B.* v. *American Oil Co.*, 387 F.2d 786, 788 (7th Cir. 1967). In view of this deference due the Board's practical expertise, we must respect the inference the Board drew from the record, for we do not have the power to

> "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488 (1951).

IV.

Dynamic II next argues that the Board's bargaining order should not be enforced because the Board failed to balance the interests and justifiable expectations of all the parties in making its successorship determination. Dynamic relies primarily on dictum in *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262-63, n.9 (1974), which states that the inquiry into whether a successor employer has legal obligations to its predecessor's employees

> "requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue. . . ."

Dynamic asserts the Board failed to follow the Supreme Court's mandate when it "mechanistically applied" presumptions established in single employer cases in ordering it to bargain with the union. According to the company, the Board neglected to take into account the turnover of unit employees between the date of the election and the bargaining request, Dynamic II's expectation at the time of purchase that no certification would issue, and the long delay from the date of the election until the final Board order. Dynamic argues that, though none of these factors taken alone might require reversal of the Board's order, taken together they outweigh whatever interests are served by imposing on Dynamic II the bargaining obligation of its predecessor employer.

The Board answers that *N.L.R.B.* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), establishes that the presumptions from single employer cases it relied on remain applicable in successorship cases. The Board rebuts, one by one, the relevance of each of the matters that Dynamic II claims excuse it, on the whole, from its predecessor's bargaining duty.

Our decision hinges on how we interpret *Burns*. In that case, Burns International Security Services outbid another employer, the Wackenhut Corporation, for the contract to provide plant protection services at the Lockheed Aircraft Service plant at a California airport. Wackenhut had held the contract for the previous five years. Burns took over the security contract less than four months after a union which had recently won a representation election was certified by the Board as the exclusive bargaining representative of the Wackenhut employees.

Burns began providing services at the Lockheed plant by retaining 27 of the Wackenhut guards and reassigning 15 of its own guards from other locations. Soon thereafter, the recently certified union demanded that Burns recognize it as the bargaining representative of the Burns employees at the plant. Burns refused, and the union filed unfair labor practice charges against Burns with the Board. The Board found that the bargaining unit remained unchanged after the Burns takeover and held that Burns had a duty to bargain with the union certified to represent its predecessor's employees. The Board's bargaining order was enforced by the Second Circuit Court of Appeals, whose decision was affirmed by the Supreme Court:

> "In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact." 406 U.S. 279.

The Court drew support for its holding both from the National Labor Relations Act's proscription against conducting representative elections within the year following a valid election and from cases holding that the "certification bar," which compels an employer to bargain with a union for a reasonable period, usually one year, following the union's certification, applies in the successor employer context as well as in the single employer context:

> "Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after

the change of ownership or management were employed by the preceding employer.[8]

[8] Cf. § 9(c)(3) of the NLRA, 29 U.S.C. § 159(c)(3), which provides that '[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period a valid election shall have been held.'

Where an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year."

406 U.S. at 278-79 (citations omitted).

The Court went on to emphasize that its decision would have been different if Burns' operational structure and practices had differed markedly from those of its predecessor or if Burns had not hired employees already represented by a certified union. *Id.* at 280.[9] In conclusion, the Court stated:

[9] The court also suggested, in a footnote, another circumstance that might have changed its decision:

"If there is a change of employers, however, and an almost complete turnover of employees, the certification may not bar a challenge if the successor employer is not bound by the collective-bargaining contract, particularly if the new employees are represented by another unit." 406 U.S. at 297, n.3.

The instant case clearly falls outside this possible exception to a successor's bargaining duty because 16 of the 31 employees employed by Dynamic II at the time of the bargaining request had voted in the representation election. Being over fifty percent of the unit employees, the turnover here is a far cry from the "almost complete turnover" mentioned in *Burns* as triggering the exception. Moreover, the new employees were not already represented by a union, nor was the old unit ruled an accretion onto another.

"[W]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union. This is the view of the several courts of appeals, and we agree with those courts." 406 U.S. at 281 (citations omitted).

We glean from *Burns* at least two principles pertinent to the case at band: (1) that the certification bar doctrine applied in single employer cases retains validity in successor employer cases; and (2) that a mere change in employers does not constitute "unusual circumstances" sufficient to rebut the presumption of a union's continuing majority status created by the certification bar, at least as long as the successor employer hires a majority of its predecessor's employees[9] and preserves substantially intact its predecessor's operational structure and practices.

The dictum in *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262-63 n.9 (1974), relied upon by Dynamic II, does not mandate a retreat from either of these principles or the method of analysis used in *Burns*. The Court's statement reads in full:

"[T]he real question in each of these 'successorship' cases is, on the particular facts, what are the legal

[9] Subsequent cases have questioned whether a successor need hire a strict majority of its predecessor's employees to meet this test, or whether a "substantial number" of employees is sufficient. *Boeing Co.* v. *International Ass'n of Machinists*, 504 F. 2d 307, 317-18, 320-21 (5th Cir. 1974); *Spruce Up Corp.*, 209 NLRB No. 19 (1974). This issue does not arise in the instant case because a majority of Dynamic II's employees were formerly employed by Dynamic I and were members of the bargaining unit that participated in the representation election.

obligations of the new employer to the employees of the former owner or their representative? The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." *Id.* at 262-63 n.9.

Dynamic contends that the Court's reference to an "analysis of the interests . . . in light of the facts of each case" means that each successorship case must turn on a balancing of the interests and expectations of the affected parties and the public presented by the facts of each particular case. Accordingly, Dynamic says the balance of interests struck, and the presumptions relied on, in *Burns* need not be deemed controlling here, where the facts differ. In effect, Dynamic II reads the Court's dictum in *Howard Johnson* as directing us to ignore the principles established in *Burns* anytime we are presented with a factually distinguishable successorship case involving the duty to bargain.

We believe the Court's references to "an analysis of the interests . . . in light of the facts of each case" must be read in concert with its reference to the "particular legal obligation . . . at issue" and its suggestion that an employer "may be a successor for some purposes and not for others." When so read, it becomes apparent that the Court is saying that the analysis that must be undertaken in one type of successorship case, such as one involving the duty to bargain, may differ substantially from the analysis undertaken in another type of successorship case, such as one involving a successor employer's duty to arbitrate disputes under a collective

bargaining agreement entered by its predecessor. We do not believe that the Court is saying that, once particular principles or presumptions are deemed relevant to determine whether a successor employer is required to perform a particular obligation of its predecessor, those principles or presumptions may be disregarded whenever the same obligation is at issue in a subsequent successorship case whose underlying facts differ from the precise facts presented in prior cases. Thus, we do not read the Supreme Court's statement in *Howard Johnson* as suggesting the analysis the Court used in *Burns* is no longer appropriate for deciding whether successor employers have a duty to bargain with their employees.[10]

Burns refines from the mass of "successorship" cases the key elements and principles relevant to determining whether a predecessor's bargaining duty should be imposed on a successor employer. By relying more on presumptions and precedent than on a *de novo* balancing of the interests arising out of each factual situation, the Board and the courts are not ignoring the equities, as Dynamic II contends, but are considering them through more focused lenses. This method of analysis represents a progressive step in the development of this area of law

[10] Lower courts, including this court, concur in the view that *Burns* approves the Board's use of presumptions normally applied in a single employer context for cases involving a successor employer's duty to bargain. See *Zims Foodliner* v. *N.L.R.B.*, 495 F. 2d 1131, 1138-42 (7th Cir.), cert. denied, 419 U.S. 838 (1974); *N.L.R.B.* v. *Bachrodt Chevrolet Co.*, 468 F.2d 963, 967-68 (7th Cir. 1972), *vacated and remanded on other grounds*, 411 U.S. 912 (1973); *N.L.R.B.* v. *Band-Age Inc.*, 534 F.2d 1, 4-5 (1st Cir.), *cert. denied*, 97 S. Ct. 318 (1976); *N.L.R.B.* v. *Wayne Convalescent Center*, 465 F.2d 1039, 1043 (6th Cir. 1972); *N.L.R.B.* v. *Denham*, 469 F.2d 239, 244 (9th Cir. 1972), *vacated and remanded on other grounds*, 411 U.S. 945 (1973); *N.L.R.B.* v. *Geronimo Service Co.*, 467 F.2d 903, 904 (10th Cir. 1972); accord, *Spruce Up Corp.*, 209 NLRB No. 19, 95 LRRM 1426 (1974), *enf'd* 90 LRRM 2525 (4th Cir. 1975).

because it serves important policies of uniformity and predictability of decision-making that were, for the most part, neglected in the past. See Slicker, *A Re-Consideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach,* 67 Minn. L. Rev. 1051, 1063, 1102-04 (1973).

V.

Applying the *Burns* analysis to the case at hand, we first note the presence of the two elements emphasized in *Burns* — the continuation by the successor of its predecessor's operations and practices,[11] and the successor's hiring of a majority of the employees in its predecessor's bargaining unit.[12]

Given the presence of these elements, the certification bar rule imposes on Dynamic II a duty to bargain with the union for the year following its certification, unless "unusual circumstances" are present. *Burns, supra* at 279.

To determine what may constitute "unusual circumstances" sufficient to negate Dynamic II's duty to bargain, we must, as the *Burns* Court did, look to cases in the single employer context. The primary case speaking to this issue relied on in *Burns* mentioned three circumstances as being sufficient to rebut the presumption of a union's continued majority status for one year following its certification:

"(1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the

[11] The stipulation of facts presented to the Board establishes that Dynamic II made no significant changes in the operation and practices of Dynamic I's business. As previously discussed, tthe employees faced essentially the same working conditions under both employers, and the bargaining unit was identical.

[12] Dynamic II started operations by retaining all 30 employees in Dynamic I's bargaining unit.

members and officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time." *Brooks* v. *N.L.R.B.* 348 U.S. 96, 98-99 (1954).

Only circumstances of comparable magnitude can overcome the certification bar when it is applied, as in *Burns,* to successor employers who hire a majority of their predecessor's employees and continue their predecessor's operations and practices.

Dynamic II presents us with several circumstances that it claims negate any bargaining duty it may have. We find none of them to be of sufficient magnitude to overcome the application of the certification bar rule to this case.

Dynamiic II primarily argues that the combination of the close representation election and the turnover of approximately one-half of the voting employees in the unit between the election and the bargaining request created sufficient doubt about the union's continued majority status at the time of the bargaining request to excuse Dynamic's failure to bargain. In light of this turnover, Dynamic II argues that it would be contrary to the interests of its present employees to force them to accept the union's representation without conducting another representation election.

This very argument, however, was raised by the dissenting Justices in *Burns* and implicitly rejected by the majority's holding. In *Burns,* the successor employer was obligated to bargain with a union that had been selected in an election involving, at most, 27 of the 42 employees retained by the successor employer.[13] 406 U.S. at 275. Here, 18 of the 31 employees employed by

[13] The *Burns* opinion does not specify how many of the 27 Wackenhut employees hired by Burns voted in the election.

Dynamic II when the union formally demanded recognition had voted in the election. The slightly greater percentage of employee turnover in the instant case is not significant enough to distinguish this case from *Burns*.

Moreover, a similar argument was rejected by this court in *N.L.R.B.* v. *Bachrodt Chevrolet Co., supra* note 10, at 968, where we held:

> "When, as here, there is at least a prima facie showing that the union represented a majority of the employees within a year of the change in ownership, it must be presumed that the union's status continued beyond the changeover." Cf. *Zims Foodliner, Inc., supra* note 10, at 1138, 1141.

The employee turnover factor, thus, does not constitute an unusual circumstance that excuses Dynamic II's bargaining duty.

Dynamic II next argues that it should not be required to bargain with the union because it purchased Dynamic I without notice or knowledge of the union's certification, which occurred after the sale. This contention is belied by the facts. Dynamic II purchased Dynamic I after the hearing officer had issued his report overruling three of the union's ballot challenges, and before the Board had ruled on the parties' exceptions to the hearing officer's report. Dynamic II argues that it believed at the time of purchase that the certification would not issue because it assumed the hearing officer's report would be sustained by the Board, and thus the three ballots challenged by the union would be opened and would cause a tie election.

Whatever the validity of such assumptions, Dynamic II was not unaware that the union might be certified by the Board after the purchase. Certainly Dynamic's own reliance on what proved to be erroneous assumptions

cannot now be used as a shield to excuse its duty to bargain with the union.[14]

Finally, Dynamic II argues that the Board should not have issued its bargaining order because the long delay due to Board proceedings from the date of the election until the Board's bargaining order, in itself, has created a substantial doubt as to whether the unit employees still desire the union to represent them. To be sure, the election occurred almost three years ago, but such delay is not uncommon in cases such as this, and this Circuit has expressly ruled that such post-election delay cannot preclude enforcement of a bargaining order. *N.L.R.B.* v. *Copps Corp.*, 458 F.2d 1227, 1230-31 (7th Cir. 1972); *N.L.R.B.* v. *Henry Colder Co.*, 447 F.2d 629, 630 (7th Cir. 1972); *N.L.R.B.* v. *Kostel Corp.*, 440 F.2d 347, 353 (7th Cir. 1971).

We reiterate our reasoning in *Copps*:

> "'[L]ater events should not be permitted to preclude enforcement, since the delay is "the unfortunate but inevitable result of the process . . . prescribed in the Act.'" *Kostel,* 440 F.2d at 353 . . . . To hold otherwise would put a premium on delay and procrastination by the company in complying with the Board's order."[15] 458 F.2d at 1231.

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[14] *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168 (1973), cited by Dynamic II for the proposition that a successor employer is bound only by legal obligations it was aware of at the time of purchase, does not require a contrary conclusion because Dynamic II was aware when it purchased the business that the union might be certified. The possibility of certification was a matter that could have been reflected in the price paid for the business. *Id.* at 185.

[15] *Clark's Gamble Corp.* v. *N.L.R.B.*, 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868 (1970), the principal case relied on by Dynamic II in its post-election delay argument, was expressly rejected by this Circuit in *N.L.R.B.*

We adhere to our prior views that delay due to Board proceedings cannot be used to excuse Dynamic II's duty to bargain with its employees.

Having shown no unusual circumstances significant enough to overcome the presumption of the union's continuing majority status arising from its recent certification, Dynamic II was properly found to have a duty to bargain with the union.

ENFORCED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[15] (Continued)

v. *Henry Colder Co., supra* at 630 n. 2. A later case, *N.L.R.B.* v. *Caravelle Wood Products, Inc.*, 466 F.2d 675, 679 (7th Cir. 1972), distinguished *Clark's Gamble Corp.* on the ground that the elements compelling the Sixth Circuit to deny enforcement in *Clark's Gamble* were not present, *i.e.*, a delay occasioned primarily by Board inaction of more than five years after a majority determination based on union authorization cards. We need not decide whether *Caravelle Wood Products* signals the renewed vitality of the *Clark's Gamble* doctrine in this Circuit because none of the exceptional circumstances present in *Clark's Gamble* are present in the instant case.

Dynamic Machine Co. *and* District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO. Case 13-CA-13997

December 15, 1975

DECISION AND ORDER
BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

On the basis of a charge filed by District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO, hereafter referred to as the Union, on February 13, 1975, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint against Dynamic Machine Co., hereafter referred to as Respondent, on March 28, 1975, and issued an amendment to said complaint on May 12, 1975. The complaint and its amendment allege that, since on or about January 31, 1975, Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union on all issues involving wages, rates of pay, hours of employment, and other terms and conditions of employment, and by refusing to provide information necessary for collective bargaining. Respondent filed an answer to the complaint on April 8, 1975, and an amendment to the answer on May 17, 1975, in which it denied the commission of any unfair labor practices.

On June 3, 1975, the parties executed a stipulation of facts and filed a motion to transfer proceedings to the Board wherein they agreed that certain documents would constitute the entire record herein,[1] waived all intermediate proceedings before an Administrative Law Judge, and submitted this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision

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[1] The parties agreed that the charge, complaint as amended, answer to the complaint and its amendments, and the stipulation of facts, including exhibits attached thereto, constitute the entire record in this case.

and Order. On June 6, 1975, the Board granted the motion, approved the stipulation, and set a date for the parties to file their briefs. Thereafter, briefs were filed by Respondent and General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record herein, as stipulated to by the parties, as well as their briefs, and makes the following findings of fact and conclusions of law:

I. THE BUSINESS OF THE EMPLOYER

Respondent was organized as an Illinois corporation on December 4, 1974, under the name of NJM Corporation. On or about January 6, 1975, Respondent purchased the entire business, including the name, goodwill, and substantially all of the property and assets of Dynamic Machine Co. At or about the time of said purchase, Respondent legally changed its name to that of the company which it purchased, Dynamic Machine Co., and has since operated under that name. The original Dynamic Machine Co. became defunct and commenced dissolution at the time of the purchase.[2]

Since January 6, 1975, Respondent's principal office and place of business has been at 3022 North Oakley, Chicago, Illinois. It is there engaged in the business of manufacturing precision parts for the metalworking industry. Respondent, in the course and conduct of its business operations, anticipates that it will annually purchase and

[2] There are two separate and distinct business entities which have operated under the name of Dynamic Machine Co. and are relevant to this case. For purposes of clarity, the seller of assets will be hereinafter referred to as Dynamic Machine Co. I, and the purchaser of the assets as either Dynamic Machine Co. II or Respondent.

receive goods and materials valued in excess of $50,000, which goods and services will be shipped from points within the State of Illinois, but will originate at points outside the State of Illinois. The parties stipulated, and we find, that the Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union, District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

On March 20, 1974, pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted among the employees of Dynamic Machine Co. I in the following appropriate unit:

> All full-time and permanent part-time production and maintenance employees including those in the shipping/receiving department and those in the inspection department; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On January 15, 1975, the Union was certified as the collective-bargaining representative of the employees in said unit[3] which we find constitutes a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act. As noted, on January 6, 1975, Respondent purchased Dynamic Co. I and hired all of its employees, including those in the above unit.

[3] Case 13-RC-13299 (not reported in volumes of Board Decisions).

B. *The Request To Bargain and Respondent's Refusal*

On January 31, 1975, the Union wrote to Respondent, Dynamic Machine Co. II, requesting a meeting to outline an agenda for negotiating a collective-bargaining agreement and also requesting certain information for purposes of collective bargaining.[4] By letter dated February 7, 1975, Respondent replied that it did not deem itself required to furnish the requested information, or to commence negotiations. Affirmatively, it asserted that the Board's Certification of Representative is in error, that all of the assets of Dynamic Company No. I, the Employer in Case 13-RC-13299, were sold to an unrelated, separately incorporated entity, and that there has been a substantial turnover of unit employees since the election. Respondent has continued to refuse to recognize and bargain with the Union as the exclusive bargaining representative of all employees in the above-described appropriate unit, and continues to refuse to provide the information requested by the Union.

C. *Discussion and Conclusions*

The complaint alleges violations of Section 8(a)(1) and (5) of the Act by Respondent's refusal since February 7, 1975, to bargain with the Union on all issues affecting the wages, hours, and other terms and conditions of employment of the employees in the above appropriate unit, unit, and by its refusal to furnish information requested by the Union for the purposes of bargaining.

Respondent contends that the complaint should be dismissed because the certification is in error, and that even if the certification was correctly issued Respondent should

[4] The information which the Union sought included the names, hiring dates, classifications, rates of pay of employees, and holiday benefits; and a copy of the current group and life insurance plan, pension and/or profit-sharing plan, and the vacation schedule.

not be bound by it because of the unique circumstances of this case. It asserts that, because of the substantial employee turnover since the election, Respondent's present employees should be given an opportunity to vote on the issue of representation. It further asserts that it would be inequitable to Respondent to compel it, as a good-faith purchaser who has not committed any independent unfair labor practices, to bargain with the Union. We find no merit in these contentions. We find, rather for the reasons set forth below, that Respondent is a successor-employer to Dynamic Machine Co. I, and that it is therefore obligated to bargain with the Union and to furnish it with information necessary for the purpose of collective bargaining.

We turn at the outset to Respondent's contention that the complaint should be dismissed because the certification in the underlying representation case was in error, and is therefore of no force. The Board, in that proceeding, overruled the Employer's objection to conduct of the election, and sustained four of the six challenged ballots in issue before it. The two remaining challenged ballots were insufficient in number to affect the outcome of the election, and the Union was therefore certified. Respondent contends that the Board erred in sustaining the four challenges to the voters which it found were supervisors, and by overruling the Employer's objection. However, it is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a refusal to bargain with the certified bargaining representative of its employees is not entitled to relitigate issues which were, or could have been, litigated in the underlying representation proceeding.[5] As Respondent has neither proffered new evidence, nor established special circumstances why this rule should not here be applied, we find no merit

[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

in its contention that the certification was improperly issued.

Proceeding to the merits of this case, the Respondent's obligations under the certification are dependent upon whether it is a successor-employer to Dynamic Machine Co. I.[6]

The parties' stipulation shows that Respondent commenced operation of Dynamic Machine Co. II on January 6, 1975, the date of the transfer of assets from Dynamic Machine Co. I to it. There was no hiatus in manufacturing operations. Respondent retained all of the unit employees formerly employed by Dynamic Machine Co. I, and continued its operation at the same location and in the same plant as its predecessor. Additionally, Respondent uses the same machinery and employs the same method of production to manufacture the same type of product as its predecessor. Both the suppliers and the customers of Respondent are primarily the same as those of Dynamic Machine Co. I.

Considering the above factors, it is apparent and we find that Respondent's operation is essentially the same as that of its predecessor in every respect and that Respondent is therefore a successor-employer under the standards established in *Burns*. In these circumstances, we find that Respondent was obligated to recognize the Union as the exclusive representative of its employees and to bargain with it concerning wages, hours, and other terms and conditions of employment.

Respondent contends, however, that a balancing of the interests involved requires that Respondent and its employees not be bound by the certification. In this regard, it argues that, in light of the significant turnover of employees in the unit since the election, a majority of the present employees have not had the opportunity to ex-

[6] See *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

press their preference on the issue of representation. The parties' stipulation shows that Respondent retained all of the approximately 36 unit employees who were employed by Dynamic Machine Co. I at the date of the transfer of assets on January 6, 1975. The stipulation also shows that since the date of the election, March 20, 1974, 17 employees in the unit left the employ of Dynamic Machine Co. I and were thus no longer employed in the bargaining unit at the time of the change of ownership. However, the fact that there was turnover in the certified unit is irrelevent to our inquiry. It is well established that absent special circumstances, there is an irrebuttable presumption that the majority status of a certified union continues for 1 year from the date of the certification.[7] As Respondent's refusal to bargain occurred during the certification year, this presumption is clearly applicable. Moreover, even if Respondent's refusal to bargain had not occurred during the certification year, the Board has long held that the factor of employee turnover does not establish that the Union has lost its majority status.[8] Indeed, new employees are presumed to support the Union in the same ratio as those whom they have replaced.[9] Accordingly, we find no merit in Respondent's contention.

Respondent further argues that, as a good-faith purchaser who assumed none of the obligations of its predecessor, it should not be required to assume the bargaining obligation. However the bargaining obligation that arises out of the certification of a representative is not an obligation which an employer has an option to assume, or to decline to assume, as part of a purchase agreement. It is rather an obligation imposed by Federal law which is un-

[7] See, e.g., *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); *Celanese Corporation of America*, 95 NLRB 664 (1951).

[8] *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1484 (1965), enforcement denied on other grounds 359 F.2d 799 (C.A. 7, 1966).

[9] *Id.*, and the cases therein cited at fn. 7.

affected by the private agreements between a successor and its predecessor.[10] As such, Respondent's argument is without merit.[11]

Accordingly, we find that the Respondent has, since February 7, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

In addition to its refusal to bargain, Respondent also refused to provide information requested by the Union which the Union deemed necessary and relevant for the purpose of collective bargaining.[12] The Board has long held with court approval that the collective-bargaining duties imposed on an employer by Section 8(a)(5) of the Act include the obligation to provide its employees' bargaining representative with information which is relevant and necessary to collective bargaining.[13] We find that the information requested by the Union, such as the names, addresses, and job classifications of the unit employees, and their wages, hours, and other current benefits, clearly constitutes information which has a direct bearing on the negotiation of wages, hours, and other terms and conditions of employment. As the information sought clearly encompasses matters which are mandatory subjects of bargaining, it is precisely that type of information which

[10] *Burns, supra,* fn. 6 herein.

[11] We also find no merit in Respondent's reliance on *Perma Vinyl Corporation, Dade Plastics Co. and United States Pipe and Foundry Company,* 164 NLRB 968 (1967). That case, which involved a successor's duty to remedy the unfair labor practices of its predecessor, is clearly inapposite.

[12] See *supra,* fn. 4.

[13] *N.L.R.B.* v. *Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967).

employers are required to provide to enable unions to bargain intelligently and to fulfill their obligations as the selected representative of the employers' employees.[14] Accordingly, we find that, by its refusal to provide the information which was requested by the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

IV. THE REMEDY

Having found that Respondent, Dynamic Machine Co., has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and that it take certain affirmative action necessary to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.,* 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company,* 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

[14] See, e.g., *Food Employer Council, Inc., et al.,* 197 NLRB 651 (1972); *Union Carbide Corporation, Carbon Products Division,* 197 NLRB 717 (1972); *Taylor Forge and Pipe Works,* 113 NLRB 693 (1955); *Phelps Dodge Copper Products Corporation,* 101 NLRB 360 (1952).

Conclusions of Law

1. Dynamic Machine Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All full-time and permanent part-time production and maintenance employees including those in the shipping/receiving department and those in the inspection department; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. Since January 15, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 7, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By refusing on or about February 7, 1975, and at all times thereafter, to provide the above-named labor organization with the information requested by it for purposes of collective bargaining, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain and refusal to provide information Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Dynamic Machine Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and permanent production and maintenance employees including those in the shipping/-receiving department and those in the inspection department; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to provide the above-named labor organization with information requested by it for the purpose of collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, it an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, provide the above-named labor organization with information requested by it for the purpose of collective bargaining.

(c) Post at its Chicago, Illinois, facility copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Supreme Court, U. S.
FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

No. 76-1658

In the Supreme Court of the United States

OCTOBER TERM, 1977

DYNAMIC MACHINE CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JOHN G. ELLIGERS,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 552 F. 2d 1195. The decision and order of the National Labor Relations Board (Pet. App. 21a-32a) are reported at 221 NLRB 1140.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1977. The petition for a writ of certiorari was filed on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner, a successor company that retained all of its predecessor's

employees and made no significant changes in operations, was required to bargain with the union selected in a recent Board election that was conducted prior to petitioner's purchase of the business.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pages 2-3 of the petition.

STATEMENT

Dynamic Machine Company ("Dynamic I") operated a manufacturing business performing machine shop functions and employing approximately 40 employees (Pet. App. 22a-23a). On March 20, 1974, pursuant to an election petition filed by District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO ("the Union"), the National Labor Relations Board conducted a representation election among Dynamic I's employees. Nineteen votes were cast for the Union and 14 votes against; six other ballots were challenged on the ground that they were cast by supervisors (Pet. App. 2a, 23a). On January 6, 1975, while Board proceedings to determine the validity of the challenges were pending, Dynamic I transferred ownership of the business to NJM Corporation, which operated it under the name of Dynamic Machine Company ("Dynamic II") (Pet. App. 22a).

Dynamic II retained all of Dynamic I's employees and continued Dynamic I's business without interruption at the same location and in the same plant. Dynamic II utilized essentially the same equipment and methods of production to manufacture the same type of product for primarily the same customers as Dynamic I (Pet. App. 26a). Dynamic II officials were aware of the pending Board proceedings at the time of the transfer of ownership (Pet. App. 3a).

On January 15, 1975, the Board sustained the Union's challenges to four of the six unopened ballots and certified the Union as the employees' representative (Pet. App. 3a-4a, 23a, 25a).[1] On January 31, the Union requested Dynamic II to bargain with it, and on February 7, Dynamic II refused the request (Pet. App. 24a). At the time of the refusal Dynamic II employed 33 employees, of whom 18 had voted in the Board election (Pet. App. 3a).

The Union filed unfair labor practice charges with the Board. Upon a stipulated record, the Board found that Dynamic II was a successor-employer under the standards established by this Court in *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, and that accordingly it violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union and by refusing to provide certain information requested by the Union relevant to collective bargaining (Pet. App. 26a-29a). The Board entered an appropriate remedial order (Pet. App. 31a-32a).

The court of appeals enforced the Board's order, upholding the Board's conclusion that, under the principles announced in *Burns*, Dynamic II was a successor-employer required to recognize and bargain with the union previously selected by its employees (Pet. App. 16a-20a).

ARGUMENT

1. In *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, the Court sustained the Board's conclusion that Burns, as the

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[1]The Board did not determine the validity of the remaining two unopened ballots because they could not have affected the outcome of the election (Pet. App. 25a).

successor to a contract held by Wackenhut Corporation to furnish guard services, was required to bargain with the union that had represented Wackenhut's employees. The Court noted (*id.* at 278) that "[i]n an election held but a few months before, the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in an identical unit." In these circumstances, the Court held (*ibid.*), "it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact." The change of employers did not change the "employing industry," and, "[w]here an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year." *Id.* at 279 n. 3 (citing *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98-99).

This case is like *Burns*. Dynamic I's employees selected the Union as their collective bargaining representative in a Board election. When Dynamic II purchased the business shortly before the Board certified the election results, Dynamic II retained all of Dynamic I's employees and made no changes in Dynamic I's methods of operation. Since the Union enjoyed an almost conclusive presumption of majority status before the ownership transfer and that transfer was not accompanied by any change in unit or employee complement that might have rebutted the presumption, the Board and the court below properly concluded that, under the principles established in *Burns*, Dynamic II was required to recognize the Union as the collective bargaining representative of its employees.

2. Contrary to petitioner's contention (Pet. 11-12), the Board and the court below did not ignore the

teaching of *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249, in applying to this case the presumption of continued majority status during the first year of a certification. In *Howard Johnson* the Court held that a successor who hired less than a majority of the predecessor's employees was not bound by, and thus had no duty to arbitrate under, the predecessor's contract with the union. The Court stated that the answer to the inquiry into the legal obligation of the new employer to the employees of the former owner or their representative

> requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. [417 U.S. at 262-263 n. 9.]

The court below correctly concluded (Pet. App. 14a-15a) that this statement merely emphasizes that "the analysis that must be undertaken in one type of successorship case involving the duty to bargain, may differ substantially from the analysis undertaken in another type of successorship case, such as one involving a successor employer's duty to arbitrate disputes under a collective bargaining agreement entered by its predecessor." The statement does not suggest that the analysis that the Court approved in *Burns* is "no longer appropriate for deciding whether successor employers have a duty to bargain with [the representative of] their employees" (*id.* at 15a).

Beyond that, the court of appeals did not, as petitioner suggests (Pet. 12), engage in a "mechanistic application of the Board's certification year doctrine." Rather, it carefully considered the particular facts of this case in light of the principles enunciated in *Burns* and *Howard Johnson* (Pet. App. 9a-17a), and it correctly rejected petitioner's argument (Pet. 10, 18) that the close representation election, coupled with the turnover of approximately one-half of the voting employees in the unit between the election and the bargaining request, created sufficient doubt about the Union's continued majority to justify petitioner's refusal to bargain (Pet. App. 17a-18a):

> This very argument * * * was raised by the dissenting Justices in *Burns* and implicitly rejected by the majority's holding. In *Burns*, the successor employer was obligated to bargain with a union that had been selected in an election involving at most, 27 of the 42 employees retained by the successor employer [footnote omitted]. 406 U.S. at 275. Here, 18 of the 31 employees employed by Dynamic II when the union formally demanded recognition had voted in the election. The slightly greater percentage of employee turnover in the instant case is not significant enough to distinguish this case from *Burns*.

Finally, enforcement of a bargaining order is not precluded by the fact that three years have passed since the election was held (Pet. 18). Such a time lapse is the inevitable result of utilizing the procedures provided by the Act. To deny a bargaining order because of that circumstance "would put a premium on delay and procrastination by the company in complying with the Board's order." *National Labor Relations Board* v. *Copps Corp.*, 448 F. 2d 1227, 1231 (C.A. 7). See also

National Labor Relations Board v. *Gissell Packing Co.*, 395 U.S. 575, 610-611.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JOHN G. ELLIGERS,
Attorney,
National Labor Relations Board.

JULY 1977.

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[2]There is no occasion for this Court to reexamine *Burns*, as petitioner requests (Pet. 20-22). *Burns* was decided only recently, after full consideration by the Court of the various competing considerations, and it has been cited with approval in subsequent decisions. See *Golden State Bottling Co.* v. *National Labor Relations Board*, 414 U.S. 168, 183-185; *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, supra*, 417 U.S. at 254-262. See also *National Labor Relations Board* v. *Spitzer Akron, Inc.*, 540 F. 2d 841 (C.A. 6), certiorari denied, January 10, 1977, No. 76-560; *Zim's Foodliner, Inc.* v. *National Labor Relations Board*, 495 F. 2d 1131 (C.A. 7), certiorari denied, 419 U.S. 838.

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